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TO THE

Supreme Court of the United States

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

against

SAMUEL GOLDBERG,
Respondent.

Your petitioner respectfully shows:

1. Your petitioner is a railroad corporation, incorporated under the laws of the states of New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois, formed by the consolidation, as of December 23rd, 1914, of the New York Central & Hudson River Railroad Company and other railroad corporations and as such is the successor, in interest, of the New York Central & Hudson River Railroad Company, and is a common carrier engaged in intra-state and inter-state transportation of persons and property for hire.

2. On the 31st day of March, 1913, Samuel Goldberg, the respondent herein, commenced an action in the Supreme Court of the State of New York, New York County, against the New York Central & Hudson River Railroad Co., your petitioner's predecessor in interest herein.

3. In the complaint in that action it is alleged that "on or about the 17th day of September, 1912, at the City of New York, in consideration of a reasonable compensation then agreed to be paid to it by the plaintiff, and which compensation was the usual freight rate for dry goods, between New York City and Cin-

cinnati, the defendant agreed to safely carry to Cincinnati, Ohio," certain property of the plaintiff and that defendant negligently lost or permitted same to be stolen while in transit (fols. 13-18).

4. In its answer in that action the defendant alleged that if it received the property referred to in the complaint, the said property was received for transportation pursuant to the provisions of a bill of lading in which said property was described as a case of dry goods. That the tariffs and classifications of the defendant, duly posted, published and filed with the Interstate Commerce Commission and in effect on the date said property was received, provided for a first-class rate of 65c per hundred weight for the transportation of dry goods from New York City to Cincinnati, Ohio, and a double first-class rate of $1.30 per hundred weight for the transportation of furs between said points. That defendant relied upon the description of the property contained in the bill of lading and agreed to transport it at the rate provided in its said tariffs and classifications for the transportation of dry goods. That said property was stolen in transit and thereafter the shipper presented a claim to the defendant for the loss of furs. That defendant did not know that the case contained furs when it received same and did not learn that the contents of the case consisted of furs until after the property was stolen (fols. 22-27).

5. The action was tried by the court without a jury on January 28th, 1914 (fols. 55-57).

6. The bill of lading which the defendant issued for the transportation of the property in question contained the following description "one (1) case D. G." meaning dry goods. This description of the contents of the case was inserted in the bill of lading by August Smith, an express driver employed by J. Cohan who did all of the trucking business for Messrs. Steinbach Bros., the shippers of the property and who testified

that he had instructions from his employer to describe all property which he received from that firm as "dry goods" (fols. 81-90—Defendant's Exhibit "A", p.,47).

7. Abraham S. Shimm, a member of the firm of Steinbach Bros., testified that the contents of the case consisted of furs of the kind and value shown in copy of invoice from Steinbach Bros., to the consignee, the total value of the invoice being $693.75 (fols. 58-60—Plaintiff's Exhibit 1, p. 40). Steinbach Bros. are manufacturing furriers and ship no dry goods (fols. 66-67). On June 1, 1912, three other cases of furs, which were described by them in the bill of lading as "dry goods" were delivered to the defendant for transportation (fols. 67-69—Defendant's Exhibit "B", p. 48).

8. Over defendant's objection and exception, plaintiffs were permitted to introduce evidence of members of the firm of Steinbach Bros. that the words "furs, value $750.00" were marked on the corner of the case in addition to the name and address of the consignee which was marked on the center of the case (fols. 61-63 and 69).

9. The billing clerk employed by defendant at its station at 33rd Street, New York City, where the case of goods was received, did not see the case itself and relied upon the description of the contents thereof in the bill of lading. The case was billed as a case of dry goods and at the rate provided in the defendant's filed schedules for the transportation of dry goods, viz., 65c per hundred weight. It is not usual or customary to inspect the contents of cases of goods to ascertain whether they correspond with the description in the bill of lading unless there is some reason to believe that the shipper is misrepresenting the character of his property and no inspection of the contents of this case was made by defendant's billing clerk (fols. 92-114—Defendant's Exhibit "C", p. 49).

10. On the date the defendant received this case of goods the tariffs and classifications which it had filed with the Interstate Commerce Commission, provided for first-class rate of 65c per hundred weight for the transportation of dry goods between New York City and Cincinnati, Ohio and double first-class rate of $1.30 per hundred weight for the transportation of furs between the said points (fols. 90-91).

11. Defendant conceded that the property was not delivered to the consignee (fols. 56-57).

12. Defendant moved to dismiss the complaint at the close of plaintiff's case and also at the close of the entire case on the ground that the property was described as "dry goods" and the rate charged for its transportaion was the established rate for the transportation of dry goods and that a different and higher rate would have been charged under the filed tariffs if it had been described as "furs" (fols. 90-91 & 115-116).

13. The Trial Justice held that the plaintiff was charged with such legal results as followed from the act of the express driver in describing the property as "dry goods" but found that such false description was due to a mistake and not to fraudulent intent on the part of the shipper and for that reason and because there was no provision in the bill of lading that the defendant should not be responsible, if the goods received were not of the character therein described and because the case was marked "furs" directed a judgment for the plaintiff (fols. 43-51).

14. The judgment of the Trial Court was affirmed by the Appellate Division. In the opinion of that court it held that the decisions of this Court in *Adams Express Co.* v. *Croninger*, 226 U. S., 491, and other cases upon which defendant relied, are inapplicable, because in this case there was no misstatement of *value*, but

merely a non-fraudulent misstatement of the *kind* of goods shipped; and because there was no specific clause in the present Bill of Lading exempting the carrier from liability in case of a misrepresentation of the property. That neither the Interstate Commerce Act nor the decisions of this Court exempt a carrier from liability for a misdescription such as the present one (Opinion of the App. Div., pp. 58-61).

15. The judgment was affirmed by the Court of Appeals, which is the highest court of the State in which a decision could be had, on May 25th, 1917. No opinion was written by that court upon the affirmance of the judgment except the following memorandum:

> "Action to recover value of furs shipped by freight over defendant's road, marked as dry goods, which were stolen while in transit. Defense was that the goods were shipped as dry goods and claims not to be liable for goods of a different character than those specified in bill of lading. App. Div. relied on 226 U. S., 491."

The remittitur from the Court of Appeals was returned to the Supreme Court, New York County, on May 28th, 1917, and judgment on said remittitur was entered by the plaintiff on May 31st, 1917.

16. The question involved in this case is "Is a railroad company liable for the loss of goods of a different character than those described by the shipper in the bill of lading, and for the transportation of which a different and higher rate is fixed by its tariffs and classifications filed with the Interstate Commerce Commission, than is provided in said schedules for the transportation of goods of the character described in the bill of lading?"

17. Your petitioner avers that the present case is one in which it is proper for this court to grant a writ of certiorari for the following reasons among others:

A. The rates established by railroad companies for the transportation of freight are, with but few exceptions, determined by the classification upon which the rate is based, and the classification of an article depends upon its character and value.

B. It is well established by the decisions of this court that a shipper may not recover a greater *value* than that specified in the bill of lading and upon which the transportation charges are based, and your petitioner verily believes that the principle decided in those cases applies with equal force to a case like the present where alternative rates of the carrier are based upon the *character* and value instead of solely upon value, the value of the goods transported, but this precise question does not appear to have been involved in any case presented to this court for decision since the enactment of the amendment to the Interstate Commerce Act of September, 1906.

18. Your petitioner further avers that to permit a shipper who has misdescribed his property and as a result thereof has obtained a lower rate for the transportation of such property in interstate commerce than would have been charged if the property had been correctly described, would encourage fraudulent misbilling of property by shippers and result in preferences and discriminations in violation of the provisions of the Act to Regulate Commerce.

19. Your petitioner further avers that a decision on this question by this court is of great importance to shippers and common carriers, generally. That other cases involving the same question are now pending in the courts of New York State and other states against this defendant and other railroad companies.

20. Because of the foregoing and because of the final judgment of the Court of Appeals of New York State which is the highest court of the State in which a decision could be had and where your petitioner especially

set up and claimed a title, right, privilege and immunity under the Constitution, and statutes of, and a commission held or authority exercised under the United States and particularly a right, privilege and immunity under the Act to Regulate Commerce and the schedules filed by your petitioner pursuant to the provisions of said Act, and the decision was against such title, right, privilege and immunity, especially set up and claimed by your petitioner, the said judgment being now the judgment of the Supreme Court for New York County, New York State,

21. Your petitioner prays that a writ of certorari may issue in this case to the Supreme Court, New York County, in the State of New York, to bring up this case to this court for such proceedings therein as may be just.

THE NEW YORK CENTRAL RAILROAD COMPANY,

By E. F. STEPHENSON

Ass't. *Secretary.*

CHARLES C. PAULDING,
Attorney and Counsel for Petitioner.

STATE OF NEW YORK, }
County of New York, } ss.:

E. F. STEPHENSON, being duly sworn, says he is the (Ass't.) secretary of the New York Central Railroad Company, the petitioner herein; that he has read the foregoing petition; and that the same is true of his own knowledge, except as to the matters therein alleged to be upon information and belief, and as to those matters he believes it to be true.

Sworn to before me this 22 day of August, 1917.
J. M. O'MAHONEY.
NOTARY PUBLIC, NEW YORK CO., N. Y. No. 31
NEW YORK CO. REGISTER No 9012
My Commission Expires June 30, 1919

E. F. STEPHENSON

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this court.

William Nanu
Of Counsel for Petitioner.